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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1537

ALAN D. EISENBERG and
SYDNEY M. EISENBERG,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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INDEX

Page

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 5

I.

THE RIGHT OF ANY ATTORNEY TO PUBLICLY CRITICIZE THE OFFICIAL CONDUCT OF AN ELECTED PUBLIC OFFICIAL EITHER THROUGH VERBAL STATEMENTS MADE OUT OF COURT OR THROUGH THE PLACEMENT OF NEWSPAPER ADVERTISEMENTS IS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. THAT RIGHT MAY NOT BE ABRIDGED BY A STATE WITHOUT A SHOWING THAT THE SPEECH WAS KNOWINGLY FALSE OR MADE WITH RECKLESS DISREGARD OF THE TRUTH 5

II.

IN SUSPENDING THE LICENSES OF THE PETITIONERS BASED ON A FINDING OF DISRESPECT AND UNPROFESSIONAL CONDUCT, THE WISCONSIN SUPREME COURT APPLIED VAGUE AND OVER-BROAD STANDARDS TO THE PETITIONERS... 8

CONCLUSION 9

AUTHORITIES CITED

Cases

Baggett v. Bullitt,
377 U.S. 360 (1964) 8

Eisenberg v. Boardman, 302 F. Supp.
1360 (W.D. Wis. 1969) 3

In re Cannon,
206 Wis. 374, 240 N.W. 441 (1932) 3, 8

Garrison v. Louisiana,
379 U.S. 64 (1964) 6, 7, 9

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 6, 7

State v. Eisenberg,
48 Wis. (2d) 379, 180 N.W. 2nd 529..... 4, 6

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST.
amend. I 2, 5, 6, 7

U.S. CONST.
amend. XIV..... 2, 5

WIS. STAT., sec. 256.29 (1) 3, 8

WIS. STAT., sec. 256.29 (2) 3, 8

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INTEREST OF THE AMICUS CURIAE

The parties, through their attorneys, have consented to the filing of this Amicus Curiae Brief. Copies of their letters of consent are being submitted to the Clerk with the Brief.

The American Civil Liberties Union is a non-profit membership organization dedicated to the

preservation of the rights guaranteed by the Bill of Rights. It sought the parties' consent to the filing of this Brief because it considers the determination by the Wisconsin Supreme Court to be in derogation of the constitutional rights of the petitioners in this proceeding in that petitioners' freedom of speech was abridged by the application of vague and overbroad statutory standards without due process of law, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Sydney and Alan Eisenberg were charged with an unprofessional course of conduct bringing the Courts of Wisconsin into disrepute and contempt (Petitioner's Appendix 6) in a Complaint to the Wisconsin Supreme Court by the Board of State Bar Commissioners for the State of Wisconsin. The basis for the charge was certain statements alleged to have been made concerning the conduct of Judge John E. Krueger, County Judge of Milwaukee County, Wisconsin, and the placement of certain newspaper advertisements solicitating complaints against Judge Krueger. The Complaint charged that the alleged statements and advertisements were incident to a course of vindictive and reckless harrassment and psychological persecution of Judge Krueger causing him great mental suffering, and anguish which culminated in the Judge's suicide. It also charged that petitioners forced Judge Krueger to humiliate himself and the court by reading a press release (Petitioners' Appendix 9) designed to humiliate Judge Krueger, aggrandize the Eisenbergs, and demonstrate the subjugation of the Judge to them.

The defense moved for declaratory judgment in the United States District Court for the Western District of Wisconsin that the standards of "disrespect" and "unprofessional conduct" contained in 256.29 Wis. Stats. and used in the Complaint were unconstitutionally vague and overbroad on their face, and as applied, and for judgment declaring the Complaint using the standards to be unconstitutional. The three judge court held the statute was saved on its face by the construction given to it in In re Cannon, 206 Wis. 374, 406-408, 240 N.W. 441 (1932) which held that speech activity could not form the basis for a charge of disrespect. The Complaint was saved because it could be reasonably read to charge extortion. Eisenberg v. Boardman, 302 Fed. Supp. 1360 (W.D. Wis. 1969).

The case was heard before Referee George Young who founded that the State had failed to prove its charges (Petitioners' Appendix 119), and that two key state witnesses were incredible (Petitioners' Appendix 125-129, 144-147).

The State appealed to the Wisconsin Supreme Court, which set aside the findings of the Referee and found:

"1. That Alan Eisenberg publicly charged Judge Krueger with conduct (unspecified) for which a criminal warrant could issue;

2. That Alan Eisenberg predicted that the Judge would resign for personal reasons within a short period rather than face prosecution;

3. That Alan Eisenberg arranged for and Sydney signed checks in payment of

newspaper advertisements solicitating complaints against Judge Krueger;

4. That in concert the defendants pressured the Judge unwillingly to appoint them to an advisory committee concerning the administration of his court;

5. That in concert the defendants forced the Judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the Judge; and

6. We find that the above acts of the defendants constitute unprofessional conduct tending to bring the Courts into disrepute and contempt and that such conduct is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys, taken pursuant to Sec. 256.29, Stats." State v. Eisenberg, 48 Wis. (2d) at 379, 180 N.W. 2nd 529.

The Wisconsin Supreme Court suspended petitioners' licenses to practice law until reinstatement, allowing them to apply for readmission after one year, and assessed one half of the costs against each of the petitioners.

REASONS FOR GRANTING WRIT

POINT I

THE RIGHT OF ANY ATTORNEY TO PUBLICLY CRITICIZE THE OFFICIAL CONDUCT OF AN ELECTED PUBLIC OFFICIAL EITHER THROUGH VERBAL STATEMENTS MADE OUT OF COURT OR THROUGH THE PLACEMENT OF NEWSPAPER ADVERTISEMENTS IS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. THAT RIGHT MAY NOT BE ABRIDGED BY A STATE WITHOUT A SHOWING THAT THE SPEECH WAS KNOWINGLY FALSE OR MADE WITH RECKLESS DISREGARD OF THE TRUTH.

Although the Referee found that the State had failed to prove its charges and that two of its witnesses were incredible, the Wisconsin Supreme Court set aside the Referee's findings and held:

1. That Alan Eisenberg publicly charged Judge Krueger with conduct (unspecified) for which a criminal warrant could issue;

2. That Alan Eisenberg predicted that the Judge would resign for personal reasons within a short period rather than face prosecution;

3. That Alan Eisenberg arranged for and Sydney signed checks in payment of newspaper advertisements solicitating complaints against Judge Krueger;

4. That in concert the defendants pressured the Judge unwillingly to appoint them to

an advisory committee concerning the administration of his court;

5. That in concert the defendants forced the Judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the Judge; and

6. We find that the above acts of the defendants constitute unprofessional conduct tending to bring the Courts into disrepute and contempt and that such conduct is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys, taken pursuant to Sec. 256.29, Stats. State v. Eisenberg, 48 Wis. 2d at 379, 180 N.W. 2nd 529.

The unprofessional conduct on which Wisconsin bases its holdings consists entirely of speech and placing and paying for newspaper advertisements.

Criticism of the official conduct of public officials is protected by the First Amendment, absent a showing that the statements made were either known to be false or made with reckless disregard, whether they were true or false. The New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964). That protection extends to the out-of-court criticism of judges by lawyers, Garrison v. Louisiana, 379 U.S. 64 (1964), and to the placement of newspaper advertisements designed to seek support for a movement of public concern. New York Times Co. v. Sullivan, 376 U.S. at 265-266.

The speech activity as found by the Wisconsin Supreme Court, concerns the official action of a public official. Judge Krueger was elected to his office. A charge that a judge has engaged in conduct for which a felony warrant could issue certainly reflects on the ability and standing of Judge Krueger to hold his office.

As this Court has noted, any criticism reflecting on official conduct will affect both private and public reputations and concerning an official public reputation ". . . anything which might touch on an official's fitness for office is relevant." Garrison v. Louisiana, 379 U.S. at 77 (1964).

Freedom to criticize the official action of public officials lies at the heart of the First Amendment. The purpose of freedom of speech is to effectuate exchange of information and obtain the political changes desired by the people. Speech which moves government to responsive changes ought not lose any protection that it might otherwise have merely because it is effective. Such a test has neither precedent nor reason as a basis.

The State of Wisconsin has the power to regulate the practice of law, that regulation is still subject to the fundamental freedom secured by the United States Constitution. Labels like "unprofessional conduct" cannot save a state court's action if the standards applied fall short of those that satisfy the First Amendment. New York Times Co. v. Sullivan, 376 U.S. at 269. Amicus submit that is the situation here. The Wisconsin Supreme Court has simply asserted that Alan and Sydney Eisenberg forced Judge Krueger to do their bidding, and that in doing so they acted unprofessionally. That is a conclusion based solely on the speech activity mentioned above.

Involved in this decision are the rights of a class of persons to freely comment on elected public officials. Wisconsin lawyers ought to be free from the chilling effect the decision below is likely to create. First, lawyers are duty bound by the American Bar Association Cannon of Professional Ethics to act upon what they consider to be serious wrongs by a judicial officer in the administration of justice. Second, because of their expertise developed through frequent contact with the courts, lawyers become an important source of information in areas, like Wisconsin, where voters elect judges.

POINT II

IN SUSPENDING THE LICENSES OF THE PETITIONERS BASED ON A FINDING OF DISRESPECT AND UNPROFESSIONAL CONDUCT, THE WISCONSIN SUPREME COURT APPLIED VAGUE AND OVERBROAD STANDARDS TO THE PETITIONERS.

Section 256.29 (1) Wis. Stats. provides in part ". . . I will maintain respect due to courts of justice and judicial officers; . . . ." And Section 256.29 (2) Wis. Stats. provides in part "It is hereby declared to be unprofessional conduct . . . to violate any of the provisions of the oaths prescribed by this section; . . . ." In light of the Wisconsin Supreme Court's holding in In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932), that speech cannot be the basis for charging disrespect, and in light of the Wisconsin court's decision in this case, men of reasonable intelligence must now guess as to what the statute means. See Baggett v. Bullitt, 377 U.S. 360 (1964). The Wisconsin Statutes must cover some out-of-court speech, since it did so in this case. The charge of disrespect also has no apparent relation to truth or falsity, since falsity or reckless disregard

of the truth was neither alleged nor deemed necessary in this case. It follows that Wisconsin has adopted a form of the long disregarded doctrine of libel: the greater the truth, the greater the disrespect. Such a doctrine must fall in the face of this Court's statement that, "[t]ruth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned." Garrison v. Louisiana, 379 U.S. at 75.

By its conclusion that petitioners conducted themselves unprofessionally based only on speech, the Wisconsin Supreme Court sweeps aside protected as well as unprotected activity.

CONCLUSION

It is respectfully submitted that the Writ of Certiorari should be granted. The Supreme Court of Wisconsin has decided important federal questions in a manner not in accord with the principles of law and enunciated by this Court.

Respectfully submitted,

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